Petition

81-1060

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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH SIEGEL, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under Rule 401 of the Federal Rules of Evidence, as construed in light of the Sixth Amendment right to present relevant evidence, a trial court can exclude evidence of similar acts offered by the defendant to show absence of intent, knowledge, or plan.

2. Whether, under Rule 401 and Rule 403 of the Federal Rules of Evidence, as construed in light of the Sixth Amendment right to present relevant evidence, a trial court should be given "discretion" to exclude defense evidence that is of critical importance to the ability of the accused to defend himself.

3. Whether, in order to preserve for appeal an objection to exclusion of evidence, a defendant must not only state the purpose for which it should be admitted but also describe specifically which facts, already in evidence, make it relevant to that purpose.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, *infra*) is not yet reported. The oral opinion of the district court refusing to admit the evidence offered by the defense is reprinted in Pet. App. B, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1981 (Pet. App. C, *infra*). On October 7, 1981, the court of appeals denied a timely petition for rehearing (Pet. App. D, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Amendment VI, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the

> State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 401, Federal Rules of Evidence.

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 403, Federal Rules of Evidence.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

After a jury trial, petitioner Joseph Siegel and his co-defendant Alvin Winograd were convicted of engaging in commodity futures transactions that were "fixed, rigged, pre-arranged, non-competitive and risk-free and were 'wash sales' "; [1] of conspiring to defraud the United States by impairing the Treasury Department in the collection of income tax; [2] and of assisting in the preparation of fraudulent income tax returns. [3] The court sentenced petitioner to a fine of $500,000

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[1] Counts 4-8. Engaging in a "wash sale" in violation of 7 U.S.C. § 6c(a)(A) is a misdemeanor, punishable by a fine of not more than $100,000 or imprisonment for not more than one year or both. 7 U.S.C. § 13(c).

[2] Count 1 (18 U.S.C. § 371).

[3] Counts 2 & 3 (26 U.S.C. § 7206(2).

on five of the "wash sale" counts; on the remaining counts, the court placed petitioner on three years' probation and barred him from trading in commodities or commodities futures for one year.

A. Spread Trading In Commodities Futures For Tax Advantages

By early fall 1974, Harold Brady, one of the world's largest copper traders, had decided to shelter approximately $500,000 of short term capital gain before the end of the year. After meeting with his advisors, Brady concluded that straddles or spreads in commodity futures contracts should be used to accomplish his tax objectives (Tr. 544, 549, 1975-1976).

At the time of Brady's meeting with his advisors — and indeed throughout the entire period involved in this case — the use of spreads or straddles in commodities futures contracts was considered a legitimate method of creating tax losses or, more accurately, deferring taxable gains.[4] The tax advantages of such transactions stemmed from the nature of trading in commodity futures, which takes place on certain contract markets such as the Chicago Mercantile Exchange and its affiliate, the International Monetary Market (I.M.M.).[5]

A trade occurs when two parties enter into a commodities futures contract, which legally obligates one party to deliver and the other party to take delivery of a particular commodity in the future at a price set when the trade takes place.[6] The party on

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[4] The Economic Recovery Tax Act of 1981 contains stringent provisions limiting the use of commodity straddles to defer taxes after June 23, 1981. Pub.L.No. 97-34, §§ 501-509, 95 Stat. 323 (1981).

[5] The Commodities Futures Trading Commission Act of 1974, creating the C.F.T.C. and amending the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, became effective in April 1975. Prior to that time, currency futures traded on the I.M.M. were not regulated under the Commodity Exchange Act.

[6] Commodities futures contracts are standard by quantity and delivery date.

the buy side of the futures contract has a "long" position: he must either accept delivery of the commodity on the future date or, as almost always occurs, offset his position prior to that time by making an equal "sell" trade. The person on the sell side of the futures contract holds a "short" position: he must either make delivery of the commodity on the specified date or offset his position. Until delivery occurs or a position is offset, the position is considered "open."

In order to realize a gain when a long or short position is offset, one must sell at a higher price than one bought. In other words, a person holding a long position (the buy side) realizes a profit if the price has gone up when he offsets by taking a short position (the sell side); a person holding a short position profits if the price has dropped when he offsets by taking a long position. Whenever there is price movement, either the "longs" or "shorts" will gain while the others lose.

For these reasons, spreads were used to gain tax advantages. A person entered into a spread by taking equal and opposite positions in the same commodity but for different delivery months, as would occur if one bought 5,000 bushels of March soybeans and, at the same time, sold 5,000 bushels of May soybeans (Tr. 192). Since "the market for a commodity, if it moves in a particular direction, will generally move in the same direction for all futures of that commodity in roughly the same amount" (Tr. 193), one position or "leg" will likely show a gain while the other will show a loss, and the amounts of gain and loss will be roughly equal. The trader can then gain a tax advantage by offsetting the losing leg during one tax year to produce a short-term capital loss and by offsetting the profitable leg at some future date beyond the tax year to produce long term capital gain. As a result, even if the taxpayer's losses and gains from the spread were roughly equivalent, short-term capital losses would be incurred in one tax year while long-term capital gains would be realized in the next. For taxpayers who could deduct the short-term losses from short-term gains derived from

other sources during the first tax year, the effect was to convert those short-term capital gains into long-term capital gains, which were taxed at a lower rate.[7]

If the spread transactions worked as planned, there would not be any substantial gain or loss realized as a direct result of the commodities trades; instead, the roughly equal gains and losses would be used to defer the realization of other gains. There was a risk, however, that the market would not operate as expected, and that the trader would suffer an overall loss from the spread transactions if prices reversed direction before the expected gain was made from the profitable leg. The government charged that the spread transactions that are the subject of this case were arranged to avoid this risk of loss: that they were not engaged in by open outcry on the commodities market, but were "fixed, rigged, pre-arranged, non-competitive and risk-free and were 'wash sales,' " in violation of 7 U.S.C. § 6c(a)(A). The government further charged that the defendants willfully and knowingly conspired to defraud the United States in the collection of income tax by assisting in the preparation of tax returns claiming short-term capital losses not legitimately produced.

B. The Government's Evidence

It was in light of the potential tax advantage that Harold Brady decided in October 1974 to engage in spreads in the commodities futures market and directed his accountants to meet with petitioner Jospeh Siegel, who was president and owner of the Siegel Trading Company, a corporation engaged in the commodities brokerage business (Tr. 549, 985, 1331, 1350). In mid-October, Brady's accountants met with Siegel,

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[7] There are also three-legged spreads known as "butterfly spreads" in which, as the government's witness explained (Tr. 194-195), "you have one side of the market in between two legs of the other side of the market. And the — the two positions, the long side, for example, equals the sell side. For example, buying 5,000 bushels of March soybeans, selling 10,000 bushels of May soybeans, and buying another 5,000 bushels of July soybeans. . . ."

co-defendant Alvin Winograd and another Trading Company representative at the Company's offices in Chicago. The accountants sought proposals for sheltering $500,000 of short-term capital gain (Tr. 556), and Siegel suggested trades on the financial money market in Deutsche marks, Swiss francs, gold or Mexican pesos futures (Tr. 556-557). In response to the questions regarding how a running tally of Brady's profits and losses could be kept so he would know where he stood as the end of the tax year approached, Winograd described the kind of records he would send and took Brady's representatives to the Company's record-keeping department (Tr. 557-559). Siegel requested that Brady put up security, which Brady did in the form of an $85,000 check (Tr. 2115).

On October 17, 1974, a fews days after the meeting, a 1,000 contract spread in Mexican peso futures was established for Brady's account (Tr. 562).[8] Carl Leaven, one of the Trading Company's commodity brokers, traded for Brady's account in these transactions; Winograd, trading for the account of another client of the Company, took the opposite sides of the transactions (Tr. 242).

Between October 1974 and December 31, 1974, Brady met frequently with his accountants in order to keep track of his account at the Trading Company and its effect on his tax situation (Tr. 1985-1986). On two separate occasions sometime during these three months, Siegel said to Winograd "We have to do more for Harold," to which Winograd replied that "we 'had to have a trading range' " (Tr. 930). By the end of 1974, $448,450 in losses had been generated for Brady's account at

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[8] Mexican pesos are traded in quantitites of one million pesos per contract (Tr. 180-181). The October 17 transaction was in the form of a "butterfly spread," as described *supra*, at note 7. Brady sold 500 contracts of March 1975 pesos at 7.920 cents per peso, bought 1,000 contracts of June 1975 pesos at 7.878 cents per peso and sold 500 contracts of September 1975 pesos at 7.820 cents per peso (Tr. 242).

the Trading Company through transactions in Mexican peso futures (Tr. 249, 566; Gov't Ex. 80A). These losses, as well as $53,000 in commissions paid to the Trading Company, were reflected on Brady's 1974 federal income tax return (Tr. 1875-1876, 2207).

In early March 1975, Brady instructed his accountants to meet with Siegel. During their meeting at the Trading Company's Chicago office with Siegel, Winograd, and another company broker, Siegel remarked that "Well, we accomplished what we set out to do for 1974" (Tr. 570).

In regard to the Mexican peso spread put on in 1974, Brady's accountants pointed out that, after six months and one day, any gain would become a long-term capital gain, only half of which would be taxable, and that Brady "wanted that spread removed immediately after the six months was gone" (Tr. 571, 791). They stated further that for 1975 Brady wanted to shelter short-term gains of $1½ to $2 million. Siegel again recommended various commodities, including Swiss francs, Deutsche marks, gold and Mexican pesos (Tr. 571-572, 1995). Siegel cautioned that there was no guarantee that Brady would realize long-term capital gain if another spread were put on "but that if [Brady] waited long enough, maybe the end of 1975, maybe 1976, maybe 1977, that a capital gain could ultimately be accomplished or obtained" (Tr. 770, 572). As to putting on another peso spread, Siegel turned to Winograd and asked "What do you think, Al, can we put this up within a matter of days or weeks?" (Tr. 2071). Winograd replied "I think so" (*id.*). However, before any further transactions took place, Siegel demanded further security from Brady in the form of a million-dollar letter of credit (Tr. 2115).

On March 19, 1975, a 1,000 contract spread in Mexican peso futures was established for Brady's account (Tr. 283).[9] Wino-

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[9] This transaction was also in the form of a "butterfly spread" (see note 7 *supra*) and consisted of the following: Brady "sold 500 March 1975 peso

grad executed the trades for both sides of the transaction (Tr. 1191-1192). Further transactions in Mexican peso futures for Brady's account occurred during the next three months; Trading Company brokers or Maury Kravitz, a Trading Company client who was himself a commodity broker, traded on one side while Winograd traded on the opposite side of the transactions (Tr. 1192-1194).

Sometime in May 1975, one of Brady's accountants called Siegel to inquire about a trade for Brady's account that did not appear to involve a spread (Tr. 1765). Siegel asked "What was the transaction" and the accountant explained that, according to the report he had received from the Trading Company, 80 contracts in Swiss francs were bought for Brady's account on April 22, 1975, and sold later that day (Tr. 1767). Siegel inquired "what was the result" and the accountant replied that there was a gain of $56,000 (Tr. 1767-1768). When Siegel said "fine," the accountant expressed concern that the transaction was not a straddle. Siegel told him not to be concerned, "it won't happen again" (Tr. 1768).

By mid-June 1975, $596,500 in losses had been generated in Brady's account as a result of peso trades involving the 1975 spread (Tr. 287). From June 17, 1975, through the end of the year there were no further trades in Mexican peso futures for Brady's account. Siegel explained to Brady's representative, in a telephone conversation in July or August 1975, that since the price of pesos had been leveling off, no losses were occurring, and that further trading would be done in pork bellies (Tr. 1773, 2119).

Brady's 1975 federal tax return, filed on April 15, 1976 (Tr. 630), reflected the 1975 Mexican peso and Swiss franc transactions discussed above. The $596,500 in losses from the trades

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bought 1,000 contracts of June pesos and sold 500 contracts of September pesos" (Tr. 283).

involved in the 1975 peso spread and $36,000 in commission Brady paid to the Trading Company in that year [10] were used to offset other gains Brady realized in 1975 (Tr. 2207).

C. The Government's Theory Of Culpability

The evidence showed that Winograd prearranged the Mexican peso trades involving Brady's account in 1974 and 1975. That is, the peso trades were not done by open outcry and they were not competitive (Tr. 905-906). Instead, Winograd would approach one of the brokers, say that they had traded a certain number of peso contracts at a certain price for a particular month, and have them sign the appropriate trading documents (Tr. 904-905, 1166, 1340). [11] Generally, while the other brokers traded for Brady's account, Winograd traded on the opposite side for his own account or the account of Maury A. Kravitz (Tr. 1410, 1475).

The government's theory was that the pre-arranged trades executed by Winograd with the other brokers, who were unindicted co-conspirators, were illegal "wash sales" under the Commodity Futures Trading Commission Act of 1974 [12] — that is, commodity transactions entered into for the purpose of giving the appearance that purchases and sales are being made, but without actually taking a position in the market, which

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[10] Brady's 1975 tax return also shows a long term capital gain resulting from liquidation of the 1974 Mexican peso spread (Tr. 2207-2208).

[11] The prices were, however, within the range of prices at which peso futures were then trading.

[12] The Act came effective in April, 1975. Prior to that time, currency futures traded on the I.M.M. were not regulated under the Commodity Exchange Act, and thus only the trades engaged in after April 1975 could be even arguably considered "wash sales" under the Act. The government conceded this point. See Tr. 2524; Goverment's Pre-Trial Brief, at p. 4.

position can exist only if the transactions create a risk of financial loss. [13]

Even prearranged sales, if they are conducted, as here, at market prices, are subject to the vagaries of the market and are not risk-free. Thus, in order to show that there was no risk involved, the government attempted to tie the peso futures transactions to the 1975 Swiss franc trades. When Brady's 1974 spread in Mexican pesos was liquidated, as he had instructed, Brady's account showed a net loss of $45,000, while Kravitz's account showed a net gain in the same amount (Tr. 260). The Swiss franc trades beginning on April 22, 1975, with Zelner trading for Brady and Winograd for Kravitz, resulted in a net gain to Brady of $45,000 and a net loss to Kravitz of $45,000 (*id.*), thus offsetting the results of the 1974 Mexican peso trades. A letter dated April 22 from Winograd to Brady stated that (Gov't Exhibit 60):

> This trade was made to correct the spread differential which was out of whack when we took the original spread off on 4-18. Any questions, please call me.

Although the government's case depended on the precise manner in which the trades for Brady's account were executed and on complex tie-ins between otherwise unrelated transactions, the government admitted that it had no direct proof of Siegel's knowledge of the manner in which these particular trades were accomplished (e.g., Tr. 2696). The district court thought that the proof against Siegel was slim indeed. In refusing to grant Siegel's motion for judgment of acquittal, the court found that "the amount of direct evidence regarding Mr. Siegel

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[13] This definition of "wash sales" is taken from the court's jury instructions (Tr. 2741). The Act itself does not define the phrase. See 7 U.S.C. § 6c(a)(A). Prior to trial, the district court rejected defendant's motion to dismiss the Indictment on the ground that this failure to define "wash sale" rendered Section 6c(a)(A) void for vagueness. *United States* v. *Siegel*, 477 F. Supp. 440 (N.D. Ill. 1979).

is minor at best, it is bits and pieces; that some things such as a demand for letter of credit and financial statement do cut in the other direction, and no guarantees" (Tr. 2482). Moreover, in the court's view many of the events and other matters comprising the government's case against Siegel "certainly, standing alone, or even in combination, do not evidence any evidence of guilt" (Tr. 2478).

D. The Decision Of The District Court To Exclude Petitioner's Evidence

Despite the paucity of evidence against Siegel, the court made a ruling during trial that effectively foreclosed Siegel from presenting evidence crucial to his defense. Counsel for Siegel, in his opening statement, had promised the jury that the evidence would show that the Mexican peso spreads were only a part of the plan to achieve Brady's tax objectives; that throughout the period involved in this case, trades in other commodity futures were being executed for Brady; that these trades were in cattle, hog and pork belly futures; that unlike the Mexican peso trades, Siegel himself had personally executed these trades for Brady's account and had done so legitimately, by open outcry in the competition of the marketplace; and that substantial losses and gains from these trades were reflected on Brady's 1974 and 1975 tax returns (Tr. 153-154).

The court, sustaining the government's objection, excluded this defense evidence on the ground that it was not relevant (Pet. App. B, at 11a-13a). Counsel for Siegel thereupon made the following offer of proof. In early November 1974, shortly after Winograd put on the Mexican peso spread for Brady, spreads in cattle and hog futures appeared on his statements from the Trading Company. Brady advised his accountant that he had spoken with Siegel and authorized those trades in order to accomplish his 1974 tax objectives, which might not be possible with only the Mexican peso spread (*id.* at 14a). Unlike the

Mexican peso trades, these trades were personally executed by Siegel (*id.* at 15a). As the end of the 1974 tax year approached, Brady and his representatives realized that he would need about $100,000 less in losses than they had anticipated (*id.*) and Brady therefore directed Siegel to generate gains, which Siegel did by personally executing numerous hog futures trades (*id.*). These 1974 hog and cattle trades, and the gains and losses produced by them, could *not* be segregated from the 1974 Mexican peso trades "because they were all part of one integrated tax plan" for Brady (*id.* at 16a). With respect to each of the hundreds of contracts in these commodities personally traded by Siegel for Brady as part of his 1974 tax plan, Siegel executed the trades legitimately, competitively and in accordance with all of the applicable rules and regulations (*id.* at 17a-18a).

Moreover, from the beginning of January 1975 until mid-October 1975, more than $600,000 in losses were obtained for Brady as a result of futures trading in hogs, pork bellies and cattle done personally by Siegel (*id.* at 16a). As in 1974, trading in these commodity futures was an integral part of Brady's tax plan and these trades personally executed by Siegel for Brady were legitimate and lawful (*id.* at 18a).

E. The Decision Of The Court Of Appeals

The court of appeals agreed with the trial court that the evidence against Siegel was slim and that the case was close (Pet. App. A, at 5a-6a). Nevertheless, the appellate court affirmed the lower court's decision excluding the evidence sought to be introduced in Siegel's defense. Siegel had argued on appeal that the evidence comprised in the offer of proof was relevant and admissible under Federal Rule of Evidence 401 because it rebutted evidence of a plan or scheme charged by the prosecution and it offered alternative explanations of statements of the defendant which were introduced by the govern-

ment to show intent and knowledge.[14] The court of appeals specifically addressed only the latter point, which the court rejected despite its "persuasiveness" (Pet. App. A, at 8a) because this basis of relevancy had not been explicitly argued to the district court (*id.*).

As to the other grounds of relevancy, the court of appeals held that evidence that "Siegel engaged in certain legal trades is generally irrelevant to the issue of whether he knew of other illegal trades" and that the trial court acted within its "discretion" in limiting the defense evidence, which if introduced would have raised the possibility of a "trial within a trial" (*id.*).

REASONS FOR GRANTING THE WRIT

This Court has recognized that the "function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant" and that the "[p]roper fulfillment of this function requires that, constitutional limitations aside, all relevant competent evidence be admissible."[15] This cannot be accomplished within the requirements imposed by the Sixth Amendment if the defendant is denied his right to present such relevant competent evidence. The opinion of the court of appeals in this case raises serious questions about the manner in which the courts entertain defense offers of exculpatory evidence and their interpretation of Federal Rules of Evidence 401 and 403 in reaching their decisions on admissibility. The issues presented here are important and their resolution potentially affects every criminal trial in which the defendant

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[14] Brief of Appellant, at 20-29. Defendant also contended that the excluded evidence was admissible as evidence of habit or custom "relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit or routine practice." Fed. R. Evid. 406. The court of appeals did not specifically address this argument in its decision.

[15] *Lopez* v. *United States*, 373 U.S. 427, 440 (1963).

attempts to mount a defense that goes beyond a mere denial of the charges, a defense that will, in Mr. Justice Cardozo's words, "parry by his own witnesses the thrusts of those against him." [16]

The Court has before it, as a result of the grant of certiorari in *Williams* v. *United States, cert. granted,* 50 U.S.L.W. 3365 (U.S. Nov. 10, 1981) (No. 80-2116), the question whether an appellate court may rest on the notion of discretion to sustain a trial court's exclusion of relevant evidence offered by an accused. This case presents a similar issue. By failing to respect petitioner's constitutional right to present a full defense, the court of appeals here has set itself at odds with at least two other courts of appeals (*United States* v. *Riley,* 550 F.2d 233, 236 (5th Cir. 1977); *United States* v. *Sternstein,* 596 F.2d 528 (2d Cir. 1979)), and has also rendered a decision that threatens the defendant's most important right at trial — the right to defend himself.

A.

THE EVIDENCE OFFERED BY PETITIONER WAS RELEVANT UNDER RULE 401, FED. RULES EVID., AND THEREFORE SHOULD HAVE BEEN ADMITTED

The charges in the Indictment required the government to prove that Siegel knew of and participated in "prearranging" or "rigging" the Mexican peso and Swiss franc trades for Brady's account. It was not enough that Siegel knew the trades had occurred or even that he suggested trades in Mexican pesos for tax purposes. As the government admitted, tax spreads were in themselves legitimate and the trading documents on their face showed real and lawful trades in these commodities at prices within a range reflecting actual market conditions. [17]

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[16] *In the Matter of Reilly* v. *Berry,* 250 N.Y. 456, 461 (1929).

[17] The government told the jury, in its closing argument, that "if you just look at the documents, they look like real trades" (Tr. 2709); see also *id.* at 2700.

The government had no direct evidence that Siegel instructed Winograd to execute the Mexican peso and Swiss franc by prearrangement or that Siegel had otherwise participated in consummating the trades in that manner. Rather, the government sought to tie Siegel to the illicit transactions through circumstantial evidence designed to convince the jury that Siegel had master-minded a plan to achieve Brady's tax objectives with risk-free trades. [18]

Thus, in its pretrial brief, the government stated that "only by rigging every trade could Siegel and Winograd be certain that they could create the losses Brady wanted and insure Brady made the money back next year." [19] In its opening statement, the government told the jury that the evidence would show that Siegel had a "plan" to achieve Brady's tax goals by ensuring that Brady would lose no money, a plan that would make Brady a satisfied client and induce him to transfer more of his business to Siegel's company (Tr. 102, 112). Siegel's plan, according to the government, was "that all the trades were going to be phoney" and "by rigging every single trade" he would ensure that "there wasn't going to be a net loss to Mr. Brady" (Tr. 102, 112, 122). In its closing argument, the government returned to this theme, stating repeatedly that Siegel's plan was to "get Mr. Brady's goals accomplished for him and he wouldn't lose a penny" because Siegel was "going to make sure those trades were rigged" (Tr. 2698; see also *id.* at 2535, 2700, 2704).

Under Rule 401, Fed. Rules Evid., the excluded evidence was clearly relevant to this critical proposition in the case. This evidence made it less likely that Siegel had any such plan or, in the language of Rule 401, it made the existence of a fact "of

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[18] The court of appeals noted that the "entirety of the Government's case against Siegel relied upon inferences to be drawn from his vague and oblique prior comments and from the circumstances of his senior position at the trading company" (Pet. App. A., at 5a).

[19] Government's Pre-Trial Brief, at p. 7.

consequence to the determination of the action . . . less probable than it would be without the evidence." If Siegel's plan, as attributed to him by the government, was to guarantee that Brady would lose no money while taking paper losses, how does one account for the proffer that Siegel personally traded thousands of contracts in hogs, cattle and bellies for Brady in order to achieve Brady's tax goals, that none of those trades were rigged or prearranged, and that each placed Brady at risk, subjecting him to the same danger of suffering a net loss that faced any other investor?[20] The government sought to convince the jury that Siegel's plan was to rig "all the trades" for Brady, "every single trade" designed to realize Brady's tax objectives. But the offer of proof demonstrated in no uncertain terms that Siegel's legitimate trading in hogs, cattle and bellies was as much a part of the program for achieving Brady's tax objectives as were the trades in Mexican pesos (Pet. App. B, at 12a-19a). It was therefore simply not correct that all or even a majority of the trades carried out for Brady's tax purposes were rigged, as the government sought to persuade the jury; the trades Siegel himself carried out were not, and evidence of those trades was clearly relevant to rebut the government's inferences and allegations.

It is unnecessary for us to contend that the excluded evidence would have disproved the plan ascribed to Siegel, although we believe it would have had that effect. As the Advisory Notes to Rule 401 point out, evaluating all the evidence on a particular issue is for the jury. Each piece of evidence need not be

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[20] Each contract traded in these commodities involved a considerable amount of money. For example, in the fall of 1974, one March 1975 pork belly futures contract consisted of 36,000 pounds at prices ranging from approximately $.60 to $.70 per pound — or $21,600 to $25,200 per contract. 1974-1975 Chicago Mercantile Exchange Yearbook, at p. 126.

conclusive: "A brick is not a wall."[21] Because the offered evidence made the alleged plan's existence less probable than it would be without the evidence, it was relevant.

Without citing, let alone discussing, the relevancy test in Rule 401, the court of appeals held that evidence of a defendant's lawful activity is "generally irrelevant" to his knowledge of or participation in illegal activity (Pet. App. A, at 8a). But there is no such rule of law. That a defendant's actions are lawful does not make evidence of them irrelevant or, for that matter, relevant. Such evidence is no different than any other kind of proof: whether it meets Rule 401's test of relevancy depends upon the specific nature of the evidence and the purpose for which it is introduced. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case."[22]

Had Siegel attempted to show that he had engaged in thousands of commodities transactions for numerous clients, all of which were lawful, and suggested that this demonstrated the unlikelihood that he engaged in unlawful trades on this occasion, the court might properly have rejected his offer of proof.[23] But the excluded evidence concerned a series of transactions intimately related to those the government presented, transactions that were necessarily a part of the same plan to produce tax losses. That these trades were conducted personally by Siegel in a lawful manner gave them substantial probative value in defendant's attempt to prove he did not participate in or have knowledge of any plan to rig "all the trades" for Brady.

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[21] McCormick, Evidence § 185, at p. 436 (2d ed. 1972), quoted in Advisory Committee's Notes to Rule 401, Fed. Rules Evid.

[22] Advisory Committee's Note to Rule 401, Fed. Rules Evid.

[23] See, *e.g.*, *United States* v. *Lambert*, 580 F.2d 740 (5th Cir. 1978).

The relevance of Siegel's lawful trades is highlighted by considering what would have occurred if the tables had been turned — if the transactions Siegel personally consummated had been "rigged" instead of competitive. The government doubtless would have sought to use evidence of these other trades against Siegel, and unquestionably would have been permitted to do so. Courts have consistently found such prosecution evidence to be relevant and admissible if the evidence completes the story of the crime on trial by proving its immediate context [24] or if the acts are sufficiently similar to the ones charged as part of the crime to permit an inference with respect to intent, knowledge or plan. [25] It is of critical importance that a defendant be given the same right to introduce evidence of his own acts to show lack of intent, knowledge, or plan, or to provide the context which the prosecution omits, [26] and that is precisely what Siegel sought to do in this case. Yet the district court stated that the evidence had no bearing on intent and had "very marginal relevance" to proving lack of knowledge, and the court of appeals held that such evidence is "generally irrelevant" to the issue whether a defendant knew of the unlawful activities charged. [27]

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[24] *E.g., United States* v. *Ulland*, 643 F.2d 537 (8th Cir. 1981); *United States* v. *Marino*, 617 F.2d 76 (5th Cir.), *cert. denied*, 101 S.Ct. 575 (1980).

[25] *E.g., United States* v. *Winkle*, 587 F.2d 705 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979); *Havelock* v. *United States*, 427 F.2d 987 (10th Cir.), *cert. denied*, 400 U.S. 946 (1970); *United States* v. *Goodwin*, 470 F.2d 893 (5th Cir. 1972), *cert. denied*, 411 U.S. 969 (1973).

[26] Indeed, Wigmore states that evidence having a tendency to disprove the existence of a defendant's alleged plan should always be received. II WIGMORE, EVIDENCE § 239 (Chadbourn rev. 1979).

[27] There is no question that this ground of relevancy was adequately presented to the district court. See note 40 *infra*. The appellate court's remarks (Pet. App. A, at 8a) about whether Seigel had preserved an argument for appeal were directed at another ground of relevancy. See Section C *infra*.

As this Court has recognized, few rights are more fundamental than that of an accused to present evidence in his own defense.[28] The holding of the court below and its narrow interpretation of relevance as that concept applies to defense evidence of "other acts" seriously undermines this critical right and gives to the government an advantage in the presentation of its cases that defendants do not enjoy.

To the extent that the opinion below rests on the notion that Siegel's evidence was not relevant to disprove the plan attributed to him by the government, the decision of the court of appeals not only misconstrues Rule 401 but also conflicts with *United States* v. *Sternstein*, 596 F.2d 528 (2d Cir. 1979). In that case, the government sought to convince the jury that the defendant-accountant was motivated to claim nonexistent deductions for his customers by his desire "to have satisfied customers who come back to him year after year, because they got a refund," and that he had a plan "to generate new business by gaining inflated returns for his clients." *Id.* at 530. The trial court excluded as irrelevant evidence that the defendant had prepared numerous legitimate returns for his other clients. The court of appeals found this evidence "unquestionably crucial" to the defense claim that he had no such plan and reversed. Both to settle this conflict in the circuits, and to establish definitively a defendant's critical right to present this kind of evidence on his behalf, we urge the Court to review the decision below.

B.

IN A FEDERAL CRIMINAL TRIAL, A JUDGE HAS NO DISCRETION TO EXCLUDE RELEVANT EVIDENCE CRUCIAL TO THE DEFENSE

In this case, the only other reason offered by the court of appeals for sustaining the exclusion of the defense evidence was that the trial court had "discretion" to confine "the trial to the

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[28] *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973).

issues directly presented" (Pet. App. A, at 8a). In so holding, the court of appeals misconstrued Rule 401 and Rule 403, Fed. Rules Evid., and petitioner's right, under the compulsory process clause of the Sixth Amendment, to introduce relevant evidence in his favor. [29]

The court of appeals failed to recognize that the purpose of Rule 401 is to replace the rigid standards of the past with a policy of "broad admissibility" and that "the overall effect of the relevance provisions in Article IV [of the Federal Rules of Evidence] is to limit the power of the courts to exclude evidence." [30] Properly construed, the relevancy standards in the Federal Rules of Evidence are thus consistent with the demands of the Sixth Amendment. The federal rules and practice "favor the admission of evidence rather than its exclusion if it has any probative value at all." [31]

The decision below, by invoking the notion of "discretion" to sustain the trial court's exclusionary ruling, not only violates those standards but also conflicts with *United States* v. *Riley*, 550 F.2d 233, 236 (5th Cir. 1977), which held that "Although the trial judge is traditionally accorded a wide range of discretion in the admission of evidence . . ., it is axiomatic that such discretion does not extend to the exclusion of crucial relevant evidence establishing a valid defense." See also *United States* v. *Wasman*, 641 F.2d 326, 329 (5th Cir. 1981); *United States* v. *Benveniste*, 564 F.2d 335, 341 (9th Cir. 1977); and *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1977), holding that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense" and reversing the conviction because the trial court's exclusion of Chambers' evidence ren-

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[29] *Conway* v. *Chemical Leaman Tank Lines*, 525 F.2d 927, 930 (5th Cir. 1976).

[30] 22 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5162, at pp. 25-26 (1978).

[31] *United States* v. *Carranco*, 551 F.2d 1197, 1200 (10th Cir. 1977).

dered his defense "far less persuasive than it might have been." 410 U.S. at 294.

While the Sixth Amendment does not give the defendant an absolute right to present evidence in his defense, it does require that any decision to exclude relevant evidence be made with sufficient justification. [32] Yet Rule 403, which defines the scope of a judge's discretion to exclude relevant evidence, was cited by neither the court of appeals nor the trial court. Had either court analyzed the matter in terms of that rule, as they were required to do, petitioner's evidence would have been admitted.

Although the court of appeals believed that presentation of Siegel's evidence would be time consuming, Rule 403 allows exclusion of relevant evidence on the ground of "undue delay" only if this consideration substantially outweighs the probative value of the evidence. The court of appeals never considered the probative value of Siegel's evidence and its review of the record indicated that the government's proof of guilt was slim. [33] The trial court never inquired about how much additional time petitioner's defense would take after the government had spent three weeks presenting its case, nor did the court consider the possibility of permitting introduction of some of the evidence, while limiting the amount to avoid "needless presentation of cumulative evidence." [34] As has been amply demonstrated in

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[32] *United States* v. *Peltier*, 585 F 2d 314, 332 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979), citing *United States* v. *Nixon*, 418 U.S. 683 (1974) and *Washington* v. *Texas*, 388 U.S. 14 (1967).

[33] Without the evidence offered by Seigel, the jury had a distorted view of the case. The exclusion of the evidence resulted not only in Siegel's loss of affirmative proof but also in the undue attribution of weight to the proof offered by the government. Still worse, the court's erroneous ruling had this effect in a case in which the government prevailed by the narrowest of evidentiary margins.

[34] Fed. R. Evid. 403.

our statement, the evidence was absolutely crucial to Siegel's defense and was in fact highly probative of the nonexistence of the government-charged scheme. Under the circumstances, the failure of either the trial or appellate court to consider conscientiously and thoroughly the balance between probative value and other competing concerns and their reliance on an amorphous notion of discretion to support exclusion violates the defendant's Sixth Amendment rights under the standard articulated in the *Riley* case.

In addition to deciding this case as if the Federal Rules of Evidence and the Sixth Amendment did not exist, the court of appeals failed to subject the trial court's ruling to the vigorous appellate review it demanded. As Professors Wright and Graham have pointed out, because of the defendant's constitutional right to present evidence in his favor, appellate courts reviewing decisions excluding evidence profferred by criminal defendants must not defer to the trial court's discretion on matters of relevancy and must not apply the "usual test of reversible error."[35]

C.

THE COURT OF APPEALS IMPROPERLY FORECLOSED REVIEW OF ONE ASPECT OF RELEVANCY BY ERRONEOUSLY HOLDING THAT THE ISSUE HAD NOT BEEN RAISED BELOW

Siegel argued on appeal that the evidence comprised in his offer of proof was relevant because it served to explain his statements during the course of his dealings with Brady's account, which the prosecution introduced to demonstrate, indirectly, his knowledge that the trades were unlawful. Siegel had argued that many of the statements attributed to him — such as his remarks about doing more for Brady and having accom-

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[35] 22 WRIGHT & GRAHAM, *supra*, § 5166, at pp. 75-76 and n.51. See also Westen, *Compulsory Process II*, 74 Mich. L. Rev. 191, 213 (1975).

plished what "we" set out to do for Brady in 1974 — would have appeared in a far different light if this evidence had not been excluded. Without the defense evidence, the jury had no choice but to assume Siegel's remarks referred to the illegitimate peso trades, although the excluded evidence made it appear likely that the remarks were aimed instead at Siegel's own legitimate trading for Brady in other commodity futures as part of the same tax plan.

The court held that, despite its "persuasiveness," this rationale or theory had never been presented to the district court and thus could not serve as a basis for appeal (Pet. App. A, at 8a). A review of the arguments made at the trial and appellate courts, however, reveals that the court of appeals misconceived the nature and scope of the objection required to preserve a question for review, and thereby improperly foreclosed what the court itself thought to be one of the defendant's most persuasive points. [36] Because of the constitutional dimension of a defendant's right to present evidence, it is of critical importance that appellate courts be properly instructed regarding their reviewing function.

Under Federal Rule of Criminal Procedure 51, a party objecting to a ruling of the court must make known "his objection to the action of the court and the grounds therefore." [37] This requirement has been held to mean that when evidence has been offered for one purpose and properly rejected, error on appeal cannot be predicated upon the admissibility of that evidence for

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[36] The government never suggested, either in its brief to the appeals court or at oral argument, that defendant had not adequately raised this question at trial.

[37] Federal Rule of Evidence 103(a)(2) further requires that one objecting to exclusion of evidence make the substance of that evidence known to the court by offer of proof. Defendant Siegel made a full offer of proof, see Pet. App. B, and thus clearly met this requirement.

a different purpose. [38] The party objecting must likewise state his reasons with sufficient specificity to apprise the court of the true basis of his objection. [39]

What the court below has done, however, is to require not only that defendant state his grounds — which he did — but that he describe with absolute specificity the precise manner in which the proffered evidence connects to previously introduced evidence to produce relevancy. In arguing on appeal that the excluded evidence would make the government's explanation of his statements less likely, defendant simply noted for the court of appeals which portions of the record would support his claim of relevance for the purpose of showing lack of intent, knowledge, or plan — purposes expressly articulated to the trial court. [40] The statements to which defendant referred on appeal

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[38] *E.g., Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F.2d 656, 672-674 (9th Cir. 1963).

[39] *United States* v. *LeBlanc*, 612 F.2d 1012, 1014 (6th Cir.), *cert. denied*, 101 S.Ct. 137 (1980).

[40] For example, in his memorandum opposing the government's objection to his evidence, Siegel argued that "introduction of these legitimate trades will demonstrate that Joseph Siegel was not involved in a plan to defraud the government by engaging in fixed commodities trades" and that Siegel could not have formed the plan alleged by the government to rig every trade for Brady's account because "the full extent of Seigel's *direct* involvement in the plan to obtain tax losses for Brady are represented by these legitimate trades," which indicate that Siegel did not participate in any scheme "to execute fraudulent trades to create tax losses for Brady." *Defendant's Memorandum in Opposition to Government's Motion to Exclude Evidence*, filed January 31, 1980, at pp. 3, 5. These arguments were repeated to the district court during the oral presentation of Siegel's offer of proof pursuant to Rule 103(a)(2), Fed. R. Evid. (Pet. App. B).

After the verdict Siegel again repeated these arguments, stressing that:

> The foundation upon which the *entire case* against Joseph Siegel rested is the notion that he wanted so badly to see that Brady's trades resulted in no "real" net loss that he was willing to initiate (or participate in) a phony trading scheme to *insure* that perfect result. That being

were part of the prosecution case, already presented when defendant offered his own evidence, so the trial court well knew the evidentiary basis for the defense claim of relevance. Indeed, the district court itself noted that ". . . the amount of direct evidence regarding Mr. Siegel is minor at best, it is bits and pieces" (Pet. App. A, at 5a).

The requirement that a party state the grounds for his objection in order to preserve the issue for appeal is meant to ensure that the trial court can make an informed decision and that corrective action, if any is needed, can be taken immediately.[41] These purposes were fully served by the objection and offer of proof made to the trial court. To require more, as the court of appeals did here, is to deny the defendant his right to adequate review of a decision to exclude crucial defense evidence.

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the case, what more powerful evidence was there of his innocence than the fact that the trades which Siegel personally effectuated were completely above aboard, competitive and honest? (Motion for a Judgment of Acquittal, Or In the Alternative a New Trial, at p. 17).

The government responded by stating that it had already replied to this argument during the trial (Government's Answer to Defendant's Post-Trial Motions, at p. 1) and the district court, stating that this basis had already been raised, adhered to its prior ruling (Memorandum and Order, April 13, 1980).

[41] *United States* v. *Walker*, 449 F.2d 1171 (D.C. Cir. 1971).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 1981.

APPENDIX

APPENDIX A

In the

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALVIN WINOGRAD and JOSEPH SIEGEL,
Defendants-Appellants.

Nos. 80-1548, 80-1673

DECIDED AUGUST 12, 1981

Before SWYGERT, *Senior Circuit Judge*, PELL and WOOD, *Circuit Judges*.

PELL, *Circuit Judge*. At the conclusion of a jury trial, the defendants were found guilty of conspiracy to defraud the United States by impairing the United States Treasury Department's collection of income taxes in violation of 18 U.S.C. § 371, aiding the preparation of fraudulent United States income tax returns in violation of 26 U.S.C.§ 7206(2), and entering into fixed and uncompetitive commodity futures transactions and wash sales in violation of 7 U.S.C. § 6c(a)(A). This appeal followed the entry of judgment on the jury verdict.

I

In the fall of 1974, Harold Brady, repeatedly characterized by the parties as "one of the world's largest copper traders," and apparently being desirous of providing himself with a tegurium protecting himself to some extent from the inevitable result of an overabundance of otherwise taxable income, employed the Siegel Trading Company to execute various commodity futures transactions in order to defer

certain tax payments otherwise due that year. Appellant Siegel was the president of the company, appellant Winograd was vice-president, and both appellants were active floor-traders in commodities futures. After negotiations between the appellants and agents for Brady, it was decided that one of the procedures that would be utilized to achieve this objective was the placement of "tax straddles" in Mexican peso futures contracts on the International Monetary Market in Chicago. "Tax straddles" or "tax spreads" were, at the time at least, legitimate means to accomplish the deferring of tax payments from one year to the next and sometimes the conversion of short-term gains into long-term gains. The basis of the procedure is that normally price changes in two different future month contracts of the same commodity move in the same direction and in the same amount. The deferral or conversion is accomplished by going "long" or being a net buyer in one future month of the commodity, and going "short" or being a net seller in another month of the same commodity. When the prices of the future contracts change (generally increasing in peso futures), one account will show a loss while the other shows the corresponding, and hopefully equal, gain. The key to the transaction is to liquidate the loss-bearing account or "leg" during the first tax year or in the short-term, and to liquidate the gain-bearing account or "leg," if possible, in the following tax year or in the long-term. The legs are usually immediately reestablished for future months, thus "rolling over" the transaction. If all goes as expected, the losses should nearly or exactly equal the gains and thus there would be no real economic impact on the investor. Beneficial tax treatment results, however, when, as here, the short term "losses" shelter other unrelated short-term gains in the first year, in effect converting the amount which would have been short-term gain in the first year into gain in the second year.

As stated previously, "tax straddles" were legitimate and legal means of deferring or converting tax consequences when properly executed on an established commodities futures exchange or market and through bona fide competitive trades. The Government's position in this case, however, is that the appellants executed Brady's peso trades not through bona fide trades and open-outcry on an established market, but through prearranged and uncompetitive

trades done between various employees of the Siegel Trading Company. The Government concludes therefore, that Brady improperly deducted his short-term losses and that the appellants are guilty of the charged violations.

II

Appellants' first point of contention is jurisdictional. Winograd claims that because Mexican pesos are delivered only in Mexico at the maturity of the futures contract, peso futures, in fact, all international monetary futures, do not involve commodities "in" interstate commerce as required by 7 U.S.C. § 6c(a)(A). This contention may be easily dismissed with reference to the cited section which states in part:

> (a) It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity, which is *or may be used* for (1) hedging any transaction in interstate commerce in such commodity . . . (2) determining the price basis of any such transaction in interstate commerce in such commodity or (3) delivering any such commodity sold, shipped or received in interstate commerce for the fulfillment thereof — (A) if such transaction is . . . [a wash sale, etc.]. [Emphasis supplied.]

The broad language of the statute is applicable to the facts of this case. Although delivery of the pesos underlying a futures contract may take place in Mexico, the Government presented sufficient evidence that the peso futures contract could be used to hedge an interstate transaction involving pesos, could be used to determine the price basis of an interstate transaction involving pesos, and could involve the delivery of pesos in interstate commerce. The facts that, for the purpose of convenience, bank credits are often transferred instead of the actual pesos, and that in the normal course of events actual delivery of the pesos to fulfill the futures contract does not occur because the obligations are met by offsetting trades, do not alter this result. Actual delivery of the pesos to fulfill the contract is required. *Board of Trade of Chicago* v. *Olsen*, 262 U.S. 135 (1923). *Accord, In re Siegel Trading Co.*, Com. Fut. T. Rep. (CCH) ¶ 20,452 (1977); *and see CFTC* v. *Muller*, 570 F.2d 1296, 1299 (5th Cir. 1978).

III

Winograd also complains that the Government's witness who testified regarding the jurisdictional basis of this prosecution, Richard Fung, was not properly qualified as an expert in commodity futures transactions, and was improperly allowed to testify regarding the jurisdictional issue without prior *voir dire* examination by appellants. We agree with appellants that the Government's qualification of Fung might have been arguably inadequate had he testified regarding the more technical and esoteric areas of commodity futures transactions and tax straddles. His knowledge apparently was acquired solely from reading various unnamed books. However, we do not believe the trial court abused its discretion in allowing Fung to testify without *voir dire* examination regarding some of the more mechanical aspects of futures transactions and, for example, whether they could be used to hedge other transactions. His testimony was not shown to be incorrect and undoubtedly aided the jury in understanding the issues. *Kline* v. *Ford Motor Co., Inc.*, 523 F.2d 1067 (9th Cir. 1975). He had been employed by the CFTC in market examination for over four years and appellants themselves have relied upon some of Fung's testimony in making their arguments to this court. The district judge's decision, therefore, will not be overturned.

IV

(A)

One of the more fundamental issues appellants present is that the Government's evidence was insufficient to convict them. In this argument, appellants contend that it was the Government's burden under the income tax counts to establish that the peso transactions were "risk-free" so that the short-term "losses" were improperly deducted, and that the Government failed to establish this fact by the requisite proof.

Appellants' characterization of the Government's case is in a sense warranted. We disagree, however, with their conclusion. The Government contends, basically, that the transactions were "risk-free" because they were prearranged and thus Brady had a guaranteed seller or buyer for his position when he had accomplished his tax objectives and liquidated one leg of his position. It is true that Brady had little or

no risk of market entry or exit. However, the transactions appellants executed for Brady nevertheless incorporated substantial "risks" relevant to the income tax counts because appellants did not have control over the market price of pesos and therefore Brady stood to lose substantial amounts of money if the price moved contrary to their expectations, or if the spreads between the two months' prices changed relative to each other or, in the words of Winograd on one occasion, "the spread [price] differential" had gotten "out of whack."

Notwithstanding this "risk," however, we find that the district court correctly held that the Brady "losses" were not properly deducted. Our conclusion is not based upon weighing the risks involved in the peso transactions, but is based upon the fact that the appellants did not accomplish their tax objectives through bona fide transactions in the competitive open market. The Government presented substantial evidence that Brady's trades were not done in the usual manner of open-outcry in the peso area or "pit" of the IMM, but were prearranged "crosses" done in-house between traders in the Siegel Trading Company. The trades often were not done within the relevant day's price range, and in some cases Winograd would engage in the irregular practice of "bidding" for a contract at a price lower than he was "offering." In essence, therefore, appellants *appeared* to be utilizing the organized market, but were in fact *creating* a market for their transactions at the prices they established for ulterior purposes. Such prearranged trades are not bona fide transactions supporting loss deductions.

(B)

Siegel makes the additional argument that the Government's evidence failed to establish that he knew of the prearranged trades Winograd executed for Brady. Indeed, the district judge commented: ". . . the amount of direct evidence regarding Mr. Siegel is minor at best, it is bits and pieces." We cannot fault the judge for this characterization. The entirety of the Government's case against Siegel relied upon inferences to be drawn from his vague and oblique prior comments and from the circumstances of his senior position at the trading company. Our standard of review, however, is not whether some other jury might have decided differently, but rather whether

the evidence and inferences when viewed in the light most favorable to the Government's position can reasonably be said to support the jury's determination. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). We hold that it can here, notwithstanding the closeness of the case, and thus affirm the district court's denial of appellant's motion for acquittal and the jury's conclusion on guilt.

V

Winograd's next complaint is based upon *Bruton* v. *United States*, 391 U.S. 123 (1968), and is that certain statements made by Siegel were admitted against Siegel at the consolidated trial. Winograd claims that the introduction of these statements greatly prejudiced his case and denied his right to a fair trial because of his inability to examine Siegel concerning them.

We find that the admission of these statements was proper. The statements were that, "I was crazy" and that the writing of a certain note by Winograd was "dumb and stupid." Neither of these depracatory characterizations were in any way similar to the inculpatory confession improperly admitted in *Bruton*. Indeed, the first remark did not even relate to Winograd. They were not, in short, "powerfully incriminating" of Winograd, *id.* at 135, although they did play an important role in the Government's case against Siegel. We cannot regard these remarks in themselves as prejudicial, *United States* v. *Belle*, 593 F.2d 487, 493-94 (3d Cir. 1979), *cert. denied*, 442 U.S. 911; *United States* v. *Knuckles*, 581 F.2d 305, 312-13 (2d Cir. 1978), *cert. denied*, 493 U.S. 986, and they were not vitally important to the Government's case against Winograd which was not prosecuting Winograd for dumbness or stupidity. *United States* v. *Wingate*, 520 F.2d 309, 313 (2d Cir. 1975) *cert. denied*, 423 U.S. 1074 (1976). Cautionary instructions were repeatedly given to the jury by the trial judge. In these circumstances, we find, therefore, no error in the district court's admission of the statements.

VI

Siegel next challenges certain comments made by the prosecution during its closing arguments. During the argument the Assistant United States Attorney stated:

> Ladies and Gentlemen, the idea that Mr. Siegel has a defense that he didn't know what was going on is disturbing for two reasons. First of all, as we just talked about, it is contrary to the evidence in this case.
>
> But secondly, if Mr. Siegel were acquitted on that defense, the Alvin Winograd would take the blame by himself.
>
> Now, it was Mr. Siegel's company, it was Mr. Siegel's client that these trades were executed for. It was Mr. Siegel who orchestrated the phony trades. It was Mr. Siegel whose company made $90,000. He didn't share any of that with Mr. Winograd.
>
> You can see to it that Mr. Siegel starts sharing. You can see to it that he shares the blame with Mr. Winograd, which is the very least he can do.

Siegel claims that these comments were calculated to arouse prejudice against Siegel and "had some likelihood of changing the result of the trial." We disagree. While we scarcely would wish to approve this type of approach on behalf of the Government, we are unable to say that the statements were either "calculated" unfairly to prejudice Siegel, or were they sufficient to alter the result of the trial. The comments consisted of a few sentences in almost 2800 pages of transcript. *See, e.g., United States* v. *Alpern*, 564 F.2d 755, 759-60 (7th Cir. 1977). The jury was properly instructed to consider only the evidence presented at trial and not to consider the comments of the attorneys as evidence. *See Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974). We do not find, therefore, reversible error.

VII

Finally, Siegel claims that the trial judge erred in not admitting certain evidence offered by Siegel showing that he properly entered into many futures contracts for Brady in commodities other than monetary futures. Siegel claims on appeal that the evidence should have been admitted because it shed light on the prior statements made by Siegel that served as the primary basis of the Government's case

against him. A detailed review of the record and transcript in this case, however, has failed to reveal to us any instance where this rationale or theory was presented to the district court. Rather, the only rationale for the admission of the evidence presented to the trial judge was that the evidence was relevant to show Siegel's lack of knowledge of the illegal trades. The district judge correctly refused to admit the evidence on this basis because evidence that Siegel engaged in certain legal trades is generally irrelevant to the issue of whether he knew of other illegal trades. *United States* v. *Dobbs*, 506 F.2d 445, 447 (5th Cir. 1975); *Herzog* v. *United States*, 226 F.2d 561, 565 (9th Cir. 1955), *cert. denied*, 352 U.S. 844 (1956). It is well established, furthermore, that the appellant cannot raise theories or issues for the first time on appeal which were not presented to the trial court for consideration. *Laketon Asphalt Ref.* v. *U.S. Dept. of Int.*, 624 F.2d 784, 788 (7th Cir. 1980), *Bliss* v. *Equi. Life Assur. Soc. of U.S.*, 620 F.2d 65, 70 (5th Cir. 1980). Notwithstanding some persuasiveness of appellant's present theory of introduction, this is not an "exceptional situation" where the evidence would be admissible "beyond doubt," *Wagner* v. *United States*, 573 F.2d 447, 451 (7th Cir. 1978), nor where the evidence is so compelling that it would virtually insure Siegel's success in the trial court, *Furtado* v. *Bishop*, 604 F.2d 80, 87 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

Finally, we note that the offered evidence would have introduced into the trial what could be regarded as collateral issues of some consequence, *i.e.*, the fact that the other contracts were handled could only have any materiality if they were legitimate. A real possibility of a substantial trial within a trial could have resulted. We are reluctant to disturb the trial judge's exercise of discretion in confining the trial to the issues directly presented.

The district court's refusal to admit the evidence, therefore, will not be the basis for reversal.

For the reasons given herein the judgments of conviction are

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

In the

United States District Court

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH SIEGEL and ALVIN WINOGRAD

Defendants.

Docket No. 78 CR 606

TRANSCRIPT OF PROCEEDINGS,
JANUARY 24, 1980

[1799] THE COURT: There are two other things that ought to be made a matter of record. One, as I advised you yesterday, I am granting the motion of the government to exclude certain testimony. The government filed a memorandum in support of its motion. There was a response to that motion by you as Mr. Siegel's counsel. This related to testimony respecting the propriety of trades by Mr. Siegel in pork belly, hog and —

MR. SILETS: Cattle.

THE COURT: — cattle straddles, tax straddles for Mr. Brady during part of the relevant time period.

As I told you, I read the cases that had been cited by both the government and the defense. It seems to me that in view of the fact that that government was, one, [1800] not asserting a general scheme to defraud with respect to tax straddles, but was charging such a scheme only with respect to the trades on the IMM, and in view of the fact that there was no evidence and will be no evidence, and, indeed, some efforts have been made to keep there from being any evidence of trades other than the trades in the IMM.

Finally, since it did not appear to me that this is a matter where intent is the issue so much as the evidence at most is relevant for a different purpose, that that evidence shouldn't come in. It seemed to me that in effect the evidence was being offered for the purpose of, in effect, saying that because Mr. Siegel himself did the trading in the agricultural commodities and did so properly, that from this you can infer that if he had known about the —

Well, you did infer that he did not know about the currency futures trading. It seemed to me that was too remote, too collateral. Therefore, on a relevancy basis, I have granted the government's motion.

I say that, also, because if the trading in pork bellies and hogs and cattle came in, then it would open up a whole new area of where various collateral matters relating to that trading might well have to come in.

MR. SILETS: I am not sure I understood the Court's ruling.

[1801] Our position is that in fact it does relate to intent and knowledge. I'm not sure whether your ruling says that in your judgment it doesn't or it did.

In any event, to make the record perfectly clear, we believe that these are relevant to establish intent and knowledge or the absence thereof of the offenses here involved since the engagement by Mr. Brady of the Siegel Trading Company was for the purposes of effecting the tax straddles. These in fact were effected in that way and appear on his tax return.

We believe it demonstrates that the knowledge that Mr. Siegel personally had of the manner and means by which the losses that were claimed by Mr. Brady on his return for the trades which are charged in the indictment, in effect that he had no such specific intent or knowledge of the manner and means that those trades were effected.

To demonstrate that, we would offer, among other reasons, these trades involved, which commence in November of 1974 and terminated in October of 1975.

THE COURT: Well, what I meant, Mr. Silets, is that I didn't think it had any bearing at all on the question of intent, which is the issue in

the cases that were cited to the Court. It has, it seems to me, a very marginal relevance to the question of knowledge. But I think it is not sufficiently probative that it justifies opening up a whole new area.

[1802] MR. SILETS: Well, Mr. Martin will make an offer of proof as to what we could prove. Hopefully after you hear that, maybe your view will change.

MR. MARTIN: At the outset, your Honor, I would like to note the fact that during at least one pretrial conference in your chambers before we picked the jury in this case, the government was advised that we intended to introduce evidence relating to the cattle, hogs, and belly trades put on by Mr. Siegel for Mr. Brady's account.

We also advised them in their offices prior to the jury selection in this case that we intended to introduce that evidence. At no time did they indicate to us that they were going to have any objection to the introduction of that evidence. They made no efforts in limine prior to opening statements with respect to that proposed evidence.

In fact, in my opening statement, I made substantial references to that testimony which we propose to elicit and the documents that we propose to introduce into evidence. At that time they made no objection.

I find it somewhat anomalous that now when the point in trial comes where we seek to introduce that kind of evidence, the government somewhat belatedly proffers up this objection, which is a substantial detriment to the defendant not only in terms of what we think the jury ought [1803] to be properly advised of which would relate to what we believe clearly is his intent and knowledge, but also it puts us at a substantial disadvantage because of statements that we told the jury in our opening statement, unobjected to by the government, which we now cannot fulfill.

With respect to whether there has been any evidence introduced relating to any of these trades, your Honor might recall during Mr. Lynn's cross examination by myself, I showed Mr. Brady's 1974 income tax return. In fact, I believe that that return was flashed up on the overhead projector.

I went through with Mr. Lynn the cattle and the hog trades that were on Mr. Brady's 1974 income tax return. I believe I went through almost all if not in fact all of those trades. Mr. Lynn in fact testified to the various gains and losses that were incurred in Mr. Brady's account by virtue of those cattle and hog trades. It had nothing whatsoever to do with the Mexican peso trades.

In fact, your Honor, this is what happened which caused the cattle and hog trades to be put on and additionally the pork belly trades in 1975.

Mr. Homer is aware of all these circumstances and, indeed, has testified about them in prior administrative proceedings before the Commodity Futures Trading Commission.

In October of 1974 when Harold Brady and his [1804] accountants first came to Mr. Siegel, and it was decided to put on the butterfly spread in Mexican pesos, that in fact was consummated beginning on October 17th. Thereafter, legs of that butterfly spread were lifted, the positions reestablished, which created the losses that Brady sought for the tax year 1974.

However, in November of 1974, just about 20 days, less than three weeks after the butterfly spread of Mexican pesos was put on in Mr. Brady's account, cattle and hog spreads appear.

Mr. Homer has testified that after the account statements reflecting the trades in cattle and hogs came in, he as well as Mr. Levin, Mr. Brady's son-in-law, went to Mr. Brady and asked him what this was all about. Mr. Brady told them that he had spoken to Mr. Siegel, and Mr. Siegel had in essence advised him that because of the movement or lack of movement in the pesos market, he was suggesting that Mr. Brady also execute straddles or have straddles executed for his account in other commodities to further help obtain the kinds of losses that Mr. Brady sought.

Mr. Brady, according to Mr. Homer and Mr. Levin, agreed and authorized Mr. Siegel to go ahead and put those trades on.

So, you have the beginning of the executions of the trades both on the CME and the IMM at virtually [1805] the same time. There is less than a 3-week difference between the commencement of those trades for Mr. Brady's account.

Now, Mr. Homer also has testified that in about mid-December 1974, as a result of conversations that he had with Mr. Brady and Mr. Lynn, he realized that the losses which Mr. Brady anticipated from one of his partnerships was not going to be as great as he had previously thought. That loss had been taken into consideration by the Brady people in determining what kinds of losses they needed from the butterfly spreads.

In fact, they realized that their losses were going to be almost $100,000 short of their anticipated total losses for the year. As a consequence, Mr. Homer was panicked, because now they were going to have losses which were going to exceed the short-term capital gains, losses which they would not be able to utilize.

[1806] As a consequence, Mr. Homer in a panic and the Brady people in a panic called Mr. Siegel and asked him if, because of the existence of the butterfly spreads, there could not be some gains generated which would have the effect of utilizing that additional $100,000 in losses.

It was suggested to Mr. Siegel that perhaps some gains could be obtained from the peso butterfly spread. Mr. Siegel suggested that the peso butterfly spread not be touched because of the long-term capital gain possibilities, but instead suggested that they might be able to generate gains in the cattle and hog spreads. He authorized him to go ahead and lift portions of those legs of the cattle and hog spreads, which were the profit-making sides. That is in fact what he did.

He did that beginning on about December 17 or December 20 of 1974 through the last day of 1974 or December 30th of 1974. In that time period, Mr. Siegel executed for Mr. Brady's account in hogs alone over 600 contracts, purchases and sales, on the CME in hogs.

During that time period, he executed perhaps 200 separate trades on the CME in hogs for Mr. Brady's account.

During that time period, I would say there were probably 40 or 50 — there were probably 40 different floor brokers from the CME that traded opposite Mr. Siegel when he was lifting the long legs and reestablishing the [1807] position in order to create the gains necessary for Mr. Brady's account.

As a result, Mr. Brady had gains of some $50,000 or $55,000 which were reflected on his tax return.

It is our position that we cannot segregrate out the gains produced by the trading in the hogs and the gains and the losses produced by the trading in hogs and cattle in 1974 from the Mexican peso trades, because they were all part of one integrated tax plan.

On the one hand, they had the Mexican peso butterfly. On the other hand, they had the cattle and hog spreads which, when taken as a whole, constituted Brady's tax plan and constituted what the goals were that were sought by Brady.

When Brady came in and said that he had $500,000 that he wanted deferred until the following year, and in fact that $500,000 was deferred into the following year, it was an integral part of the deferment that the cattle and hog spreads were going to be used.

In terms of the 1975 spreading in hogs and pork bellies, that began on January 2 of 1975 and continued until October 14th of 1975. During that time period, I believe the records reflect — at least records we have obtained from the CFTC which purport to show the amount of money that was rolled — that over $600,000 in [1808] losses were obtained in Mr. Brady's account through the direct activity of Mr. Siegel, through Mr. Siegel trading himself for Mr. Brady's account during the year 1975.

I would like to tender to the Court at this time some schedules that have been prepared and about which there would be testimony from Mr. Richard Hoeh, H-o-e-h, if this evidence were introduced.

The first document is entitled "Defendants' Exhibit List"; it is 10 pages long. It reflects the documents which establish the existence of Mr. Siegel's trading for Harold Brady's account from November, 1974 through October, 1975. It is approximately 85 group exhibits. In each group exhibit, which is marked day by day, there are confirmation, floor orders and/or trading cards and a trade register, all of which, we submit, would establish the existence of all of the trades that Mr. Siegel put on for Mr. Brady's account.

We have in addition a schedule entitled "Analysis of Hog, Belly and Cattle Trades" executed by Joseph Siegel for Siegel Trading

Company Account No. 33252 of Harold Brady. It is for the years 1974 and 1975. The schedule is 71 pages long.

On this schedule, it reflects a day-by-day basis: first, the date of the trades; secondly, the commodity that was traded on that particular day; thirdly, [1809] the price at which the commodity was traded; fourth, the number of contracts purchased and sold by Mr. Siegel for Brady's account; number five, the initials of the opposite broker; number six, the number of the opposite house through whom the opposite broker cleared or for whom he filled the order.

[1810] At the end of the scheduling of each day's trades, the analysis also reflects the total number of contracts traded, the total number of trades involved and the total number of brokers who were on the opposite side of Mr. Siegel during that day's trading activity. I must note that when you see a total number of brokers at the bottom of the schedule for each day's trading, there is no duplication. If the same broker was opposite Mr. Siegel on more than one occasion, his name was included in the total only once.

The third schedule that we have is a distillation of the 71-page schedule. That simply shows — it is a 3-page document — the trading date, the commodity involved, the number of contracts bought and sold, the number of trades involved and the number of brokers involved. Then it breaks it down on a yearly basis.

I would like to submit these to your Honor at this time.

THE COURT: All right.

(Whereupon, there was a brief discussion off the record, after which the following further proceedings were had herein:)

MR. MARTIN: I would like to mark as Defendants' Exhibit No. 285 the exhibit list itself. I will mark as Defendants' Exhibit 286 the 71-page schedule. Defendants' [1811] Exhibit 287 will be the summary of the hog, cattle and belly trades executed by Mr. Siegel for Mr. Brady's account.

If you will look at Exhibit 287, you will see that it reflects the totals for the year. Between November 6 of 1974 and December 30 of 1974, Mr. Siegel purchased 756 contracts of cattle and hogs and sold 758 contracts of cattle and hogs for a total of 1,554 contracts for the

account of Harold Brady. These are the straddle trades to which Mr. Lynn testified on cross examination.

In order to effect that number of purchase and sale of contracts, Mr. Siegel entered into a total of 558 separate trades with a total of 80 brokers in order to effectuate Mr. Brady's tax goals.

During the year 1975, which is the last two pages on schedule 287, in trading in hogs and bellies for Mr. Brady's account, Mr. Siegel purchased and sold 4,971 contracts of those commodity futures. He entered into 2,033 separate, individual trades in order to effect the purchase and sale of that number of contracts, and that there were 168 brokers on the opposite side who took the opposite side of Mr. Siegel's trades when he was filling orders for Mr. Brady's account.

That evidence on the face is hardly consistent with the evidence which the government has introduced relating to trades in Mexican pesos and Swiss francs, none [1812] of which Mr. Siegel participated in. It is startling when you view the trading documents themselves, particularly if you look at the confirmations, which would be admitted into evidence were we allowed to introduce this evidence. The confirmations will reflect in Mr. Brady's account an extraordinary number of trades on any given day, almost all of which were executed by Mr. Siegel. The amounts of the trades are in 1 July hog, 1 April pork belly, 1 August cattle, 3 August cattle. You don't see 500-1,000-500 spreads, butterfly spreads being put on. It simply didn't happen. This is the way Mr. Siegel trades. He trades in the pit, in the cattle, in the hog and in the pork belly pits and did at that time. This kind of evidence reflects a continuous pattern of conduct on Mr. Siegel's part to assist Mr. Brady in legitimately achieving the tax goals that he sought.

It is so striking in contrast to the evidence which the government has introduced relating to the Mexican peso and Swiss franc trades that I believe the jury is entitled to see it so they can see what Mr. Siegel in fact did and they can legitimately draw, I think, conclusions based upon the conduct of Mr. Siegel as opposed to the conduct of his co-defendant and the brokers who testified.

Now, were we allowed to introduce this evidence, your Honor, we would not only introduce the evidence relating to the documents from

Siegel Trading Company, [1813] which are in these three folders, all of which are marked on a day-by-day basis — There are several thousand documents in here. These documents were all originally subpoenaed from Siegel Trading Company by the grand jury. Prior to the trial, the government returned them to us. We have remarked them. They are all marked as Defendants' Exhibits 200 through 284.

[1814] But we would not be satisfied just to introduce the trading documents which were executed by Mr. Siegel and the account documents which would have been generated as a result of Mr. Siegel's trades for Mr. Brady's account.

Because there were over 100 brokers who filled the orders which were opposite Mr. Siegel trading for Mr. Brady's account, we have prepared approximately 140 subpoenas duces tecum for at least 60 separate brokerage houses in an effort to obtain the original trading records. Our intention was to put those floor traders, those floor brokers on the witness stand, display to them their own original trading card which, as your Honor knows from the evidence, the trader would be able to recognize because it would be in his handwriting, it would reflect the number of contracts purchased, the commodity that was purchased or sold, the price at which the commodity was purchased or sold, and it would reflect the identity of the opposite broker, who would have been Mr. Siegel, and the identity of the opposite house by number, which is 825. In fact, that is what the original trading documents do reflect.

We would have put as many brokers as we could get on the witness stand and had them testify before the [1815] jury that to the best of their knowledge and recollection — and this is is fact what we have been told by these brokers — that these trades were, indeed, put on opposite Mr. Siegel based upon the broker's own trading card, and that the trades were executed openly and competitively and by open outcry in the cattle pit, the hog pit and the pork belly pit.

I think that evidence would have clearly established Mr. Siegel's lack of intent, his lack of participation in the conspiracy as charged, and, indeed, I think it is entirely consistent with what your Honor has heard so far in terms of the evidence introduced against Mr. Siegel, which is virtually nonexistent.

APPENDIX C

In the

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 80-1548, 80-1673

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALVIN WINOGRAD and JOSEPH SIEGEL,
Defendants-Appellants.

AUGUST 12, 1981

Before

Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Appeals From
The United States District Court For
The Northern District Of Illinois
Eastern Division

No. 78-CR-606
Judge James B. Moran

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this date.

APPENDIX D

In the

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 80-1673

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH SIEGEL,
Defendant-Appellant.

OCTOBER 7, 1981

Before

Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Appeal From
The United States District Court For
The Northern District Of Illinois
Eastern Division

No. 78 CR 606-2
James B. Moran, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellant Joseph Siegel, no judge in active service has requested a

vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1060

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH SIEGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, in petitioner's trial for conspiracy to defraud the United States through the use of prearranged, noncompetitive currency futures trades, abused its discretion in refusing to admit evidence showing that petitioner entered into bona fide futures transactions in commodities other than the currency futures at issue.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1060

JOSEPH SIEGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 656 F. 2d 279.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1981 (Pet. App. 21a-22a). A petition for rehearing was denied on October 7, 1981 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on Monday, December 7, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiracy to defraud the United States by impairing its collection of income taxes, in violation of 18 U.S.C. 371; two counts of aiding the preparation

of fraudulent income tax returns, in violation of 26 U.S.C. 7206(2); and twelve counts of entering into prearranged, noncompetitive currency futures contracts (*i.e.*, wash sales) on the International Monetary Market, in violation of 7 U.S.C. 6c(a)(A) (Pet. App. 1a). Petitioner received a suspended sentence and was placed on probation for three years on the condition that he refrain from trading in commodities or commodity futures for a period of one year. Petitioner was also fined $500,000. The court of appeals affirmed (Pet. App. 1a-9a).

The evidence at trial showed that in the fall of 1974, petitioner met with Harold Brady, "one of the world's largest copper traders" (Pet. App. 1a; Tr. 728), in an effort to acquire Brady's business for his firm, the Siegel Trading Company.[1] Cognizant that Brady wished to shelter $500,000 of short-term capital gain for the year 1974, petitioner suggested that Brady establish tax "straddles" or "spreads" in currency futures contracts (notably Mexican pesos) traded on the International Monetary Market in Chicago.[2] Petitioner noted that peso futures were always issued at discount and that they generally increased in value over time (Pet. App. 1a-2a; Tr. 556-558). Petitioner stated further that approximately 1,000 peso futures contracts would be needed to shelter Brady's short-term gain of $500,000 (Tr. 557).

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[1]Petitioner was very desirous of securing Brady's business. He told Brady that "I need your business, and I will prove to you that I can handle your account better than anyone else can handle an account" (Tr. 2201).

[2]As noted by the court of appeals (Pet. App. 2a), tax straddles or spreads were used at that time to defer tax payments from one year to the next and, sometimes, to convert short-term capital gain into long-term capital gain. Tax straddles involve the simultaneous buying and selling of futures contracts of a given quantity of a commodity for delivery in different months. As the price of the commodity changes during the course of the year, one "leg" of the straddle will show a gain

On October 17, 1974, a 1,000 contract spread in Mexican pesos was established for Brady's account by the Siegel Trading Company (Tr. 242). This spread was not accomplished through open outcry on an established market; rather, it was made in a prearranged, noncompetitive fashion by having various employees of the Siegel Trading Company trading on both sides of the transaction (Pet. App. 5a).[3] The 1,000 contracts involved in the October 17, 1974, spread represented from 64 to 97% of the day's peso trading volume in the particular delivery months (Tr. 244). By "rolling over" this spread 12 times before the end of 1974—that is, by liquidating the loss-bearing "leg" on 12 separate occasions and immediately reestablishing it for future months—approximately $448,000 in short-term losses were generated for Brady's account for the year 1974 (Tr. 245-250). During this "rollover" period, petitioner told Alvin Winograd,[4] the Siegel Trading Company employee who participated in many of Brady's tax straddle trades in Mexican peso futures, that "[w]e have to do more for Harold" (Tr 930) and that "we have to roll some over for Brady" (Tr. 1342).

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while the other "leg" will show a corresponding (and usually equal) loss. Although the gains and losses will generally offset each other, beneficial tax treatment (in the form of deferral of tax or conversion of short-term gain into long-term gain) will result if the investor liquidates the loss-bearing "leg" during the first tax year or in the short-term, and then liquidates the gain-bearing "leg" in the following tax year or in the long-term. (The use of tax straddles to defer tax or convert short-term capital gain into long-term capital gain is now prohibited by Section 1092 of the Internal Revenue Code of 1954 (26 U.S.C.), as added by Section 501(a) of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 323.)

[3]Petitioner did not participate as a trader in any of these prearranged, noncompetitive currency futures transactions (Pet. App. 5a).

[4]Winograd was a co-defendant at trial. He was also convicted and his conviction was affirmed by the court of appeals (Pet. App. 1a-9a).

In March 1975, petitioner again met with Brady's representatives to discuss the tax straddles in Mexican peso futures. After remarking that "we accomplished what we set out to do for 1974" (Tr. 570), petitioner agreed to liquidate the 1974 spread as soon as it became long-term. When Brady's representatives advised petitioner that Brady wished to shelter an additional $1.5 to 2 million for 1975, petitioner recommended another large spread in Mexican peso futures (Tr. 571-572). Petitioner then turned to Winograd and said, "What do you think, Al, can we put this up within a matter of days or weeks?" (Tr. 2071). Winograd answered "I think so" (*ibid.*). At one point during the next few months, after this second 1,000 contract spread in Mexican peso futures had been established and repeatedly "rolled over" for Brady's account (Tr. 283-291), petitioner telephoned Winograd to determine "if we could do any more tax spreads to roll some more money for Harold Brady" (Tr. 1172).[5]

During the trial of this case, petitioner attempted to introduce evidence showing that he entered into many bona fide futures contracts for Brady in commodities other than currency futures. The proffered evidence consisted of documentary materials pertaining to agricultural futures contracts petitioner executed for Brady on other boards of trade, together with the testimony of up to 140 brokers who traded opposite petitioner on these transactions (Pet. App. 19a; Tr. 1814). The basis upon which this evidence was offered was that it was relevant to show petitioner's lack of knowledge of the illegal currency futures trades (Pet. App.

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[5]Some of the "roll over" transactions conducted in the spring of 1975 for Brady's account did not result in a perfect offset of gains and losses (Tr. 288-290). To correct the resultant imbalance, several money-passing trades in Swiss francs were effected between Brady's account and the account within the Siegel Trading Company that was placed opposite that of Brady for these prearranged trades (Tr. 260, 1165-1167).

7a-8a; Tr. 1798-1801, 1815). The district court refused to admit the proffered evidence on the ground that it was not relevant to rebut the government's case, which charged petitioner with participation in a scheme to defraud the United States by the use of illegal *currency* futures trades conducted on the International Monetary Market (Pet. App. 11a-12a; Tr. 1799-1800; Indictment at 2). Since the government was not asserting "a general scheme to defraud with respect to tax straddles" (Pet. App. 11a; Tr. 1800), the district court believed that there was no need to determine whether petitioner had legitimately conducted other trades for Brady in different commodities and on a different market. The district court concluded that even if the proffered evidence was marginally relevant to rebut the government's case, its admission did not justify "open[ing] up a whole new area * * * where various collateral matters relating to that trading might well have to come in" (Pet. App. 12a; Tr. 1800).

On appeal petitioner argued, *inter alia*, that the proffered evidence should have been admitted because it might have shed light on certain statements he made to Winograd that the government asserted were indicative of his guilt of the criminal violations charged. The court of appeals rejected this argument on the grounds that (1) this rationale had not been advanced before the district court in the first instance; (2) the evidence was, in any event, neither plainly admissible nor compelling in its probative force; and (3) the district court acted well within its discretion to confine the trial to the issues directly presented (Pet. App. 7a-8a).

ARGUMENT

The decision below turns on the application of settled law to the particular facts of the case and raises no question warranting this Court's review. The issues raised by the petition concern matters properly entrusted to the broad discretion of the district court, and they were fully considered and correctly decided by the court of appeals. Accordingly, the petition should be denied.

1. Petitioner claims (Pet. 14-19) that the district court abused its discretion in refusing to permit him to introduce evidence to show that he conducted bona fide trades on Brady's behalf in commodities other than currency futures. According to petitioner, the excluded evidence was "clearly relevant" (Pet. 15) to the central issue of the case. But the indictment charged petitioner with criminal conduct only with respect to the prearranged, noncompetitive currency futures trades on the International Monetary Market involving Mexican pesos and (in one instance) Swiss francs. All of the government's evidence was directed to these currency futures transactions. Thus, the fact that petitioner may have conducted legitimate trades on Brady's behalf in *agricultural* commodities on a different board of trade is not probative of the issue whether petitioner was guilty of the particular criminal conduct charged. The law is clear that "evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant." *United States* v. *Dobbs*, 506 F. 2d 445, 447 (5th Cir. 1975). "A defendant cannot establish his innocence of crime by showing that he did not commit similar crimes on other occasions." *Herzog* v. *United States*, 226 F. 2d 561, 565 (9th Cir. 1955). Accord, *United States* v. *Pappas*, 602 F. 2d 131, 134 (7th Cir.), cert. denied, 444 U.S. 949 (1979); *United States* v. *Lambert*, 580 F. 2d 740, 746 (5th Cir. 1978). Thus, in *United States* v. *General Motors Corp.*, 121 F. 2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 618 (1942), a case involving violations of the antitrust laws, the court of appeals upheld the exclusion of evidence which showed that the defendants had not engaged in anticompetitive acts against some of their dealers (121 F. 2d at 405):

> [E]vidence that the appellants had not restrained the commerce of some dealers would not prove that there was no conspiracy to restrain the commerce of dealers. Neither can such evidence disprove the affirmative

evidence that they had restrained the trade of many dealers.

Even if the excluded evidence was marginally relevant to the charged violations,[6] the district court acted well within its discretion in ruling it inadmissible. Rule 403 of the Federal Rules of Evidence provides that otherwise relevant evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Here, petitioner indicated his intention to introduce "several thousand documents" (Pet. App. 19a; Tr. 1813) and the testimony of "as many brokers as we could get on the witness stand" (Pet. App. 19a; Tr. 1814),[7] for the purpose of showing that he had conducted legitimate noncurrency commodities trades on Brady's behalf. But simply because petitioner had conducted bona fide trades for Brady in certain dissimilar commodities traded on a different market does not establish his lack of fraudulent conduct with respect to the peso futures trading. See *United States* v. *Hendrix*, 549 F. 2d 1225, 1230 (9th Cir.), cert. denied, 434 U.S. 818 (1977). As the court of appeals noted in *United States* v. *Robinson*, 560 F. 2d 507, 514 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905 (1978), "[b]road discretion must be accorded to the trial judge in such matters for the reason that he is in a superior position to evaluate the

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[6]Petitioner argued on appeal that the excluded evidence would have placed some of his statements in a "far different light" (Appellant's Br. 26). But most of the statements to which petitioner refers were made to Winograd at a time when Winograd was actively engaged in the phony Mexican peso futures transactions and prior to the first noncurrency trade. Since petitioner executed all of the noncurrency futures trades himself, there would have been no need for him to solicit Winograd's help with regard to those legitimate noncurrency futures transactions.

[7]Petitioner had prepared subpoenas for approximately 140 brokers (Pet. App. 19a; Tr. 1814).

impact of the evidence."[8] Accord, *United States* v. *Linetsky*, 533 F. 2d 192, 204 (5th Cir. 1976); *United States* v. *Brown*, 547 F. 2d 1264, 1266 (5th Cir. 1977). In the circumstances of this case, the district court properly refused to conduct "a substantial trial within a trial" (Pet. App. 8a) on an issue that had no real bearing on the criminal violations charged and that could have created confusion for the jury by injecting evidence of transactions the legality of which was never challenged.

2. Petitioner also argues (Pet. 22-25) that the court of appeals should have passed upon his claim that the excluded evidence was admissible for the purpose of shedding light on certain statements he had made to Winograd (see note 6, *supra*). But petitioner never advanced that rationale at trial (Pet. App. 8a) and, thus, never afforded the district court an opportunity to modify the ruling petitioner now challenges. See Fed. R. Crim. P. 51. Accordingly, the court of appeals properly refused to consider the matter for the first time on appeal. *Hormel* v. *Helvering*, 312 U.S. 552 (1941); cf. *Laketon Asphalt Refining, Inc.* v. *United States Department of Interior*, 624 F. 2d 784, 788 (7th Cir. 1980); *Furtado* v. *Bishop*, 604 F. 2d 80, 87 (1st Cir. 1979), cert. denied, 444 U.S. 1035 (1980). As the court noted in *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F. 2d 656, 674 (9th Cir. 1963), a plaintiff on appeal "may not base error on the fact that evidence offered for one purpose and properly rejected by the trial court may have been admissible for another purpose for which it was not offered."

3. Contrary to petitioner's claims (Pet. 14, 19-20), the decision below does not conflict with the holdings in *United States* v. *Riley*, 550 F. 2d 233 (5th Cir. 1977), or *United*

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[8] In *Robinson*, the court of appeals held that the trial court's exercise of discretion under Fed. R. Evid. 403 would be upheld unless the court acted "arbitrarily or irrationally" (560 F. 2d at 515).

States v. *Sternstein*, [redacted] F. 2d [redacted] (2d Cir. 1979).[9] In *Riley*, the government charged the defendant with willful misapplication of bank funds in violation of 18 U.S.C. 656. The defendant there controlled the bank in question and periodically caused the bank to issue him cashier's checks before it had received the funds to cover the checks. In every instance, the defendant paid for the checks within 30 days after they were issued. During the trial of the case, the district court refused to permit the defendant to introduce evidence showing that the contested transactions amounted to informal loans or extensions of credits. The court of appeals reversed. It held that the excluded evidence should have been admitted because if the jury believed that the transactions at issue constituted informal loans, there would have been no violation of 18 U.S.C. 656. See *United States* v. *Klock*, 210 F. 2d 217 (2d Cir. 1954). See also *Potter* v. *United States*, 155 U.S. 438 (1894).

The situation in *Riley*, therefore, stands in sharp contrast to the instant case. The excluded evidence in *Riley*, if believed, would have required defendant's acquittal of the bank violations charged. The excluded evidence in the case at bar, however, even if believed, would have had no effect upon the crucial issue whether petitioner acted fraudulently with respect to the Mexican peso and Swiss franc trades. Indeed, the court in *Riley* emphasized that the excluded evidence there did not concern " 'irregularity in other unrelated and dissimilar bank operations' " (550 F. 2d at 237). But it is precisely such "unrelated and dissimilar" evidence that petitioner sought to introduce.

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[9] In addition, contrary to petitioner's assertion (Pet. 14), this Court has not granted certiorari in *Williams* v. *United States*, No. 80-2116, on the issue presented here. In an order entered on December 7, 1981, this Court expressly excluded this question from the grant of certiorari in *Williams*.

In *United States* v. *Sternstein, supra*, the government's case was premised upon the theory that the defendant, a tax return preparer, had initiated a general scheme to generate new business by inflating claimed deductions on the returns of his clients (596 F. 2d at 530). In determining whether such a general scheme existed, the court of appeals held that the defendant was entitled to introduce evidence which he hoped would show that only a few of the returns he prepared contained erroneous deductions. Such evidence, if believed, could have led the jury to conclude that the false returns cited by the government were the result of inadvertence and not criminal conduct. But here the government did not charge petitioner with participation in a "general scheme to defraud with respect to tax straddles" (Pet. App. 11a; Tr. 1800). Rather, the government charged petitioner with criminal conduct with respect to specific currency futures transactions. Thus, unlike the situations in *Sternstein* and *Riley*, the excluded evidence in the present case did not relate to actions that fell within the scope of the alleged scheme to defraud.

Here, the criminal acts charged against petitioner were completed with the consummation of the unlawful currency futures transactions. Those trades, and only those trades, furnished the illegitimate paper losses used to shelter Brady's other income. The noncurrency transactions were not part of the scheme artificially to create losses for tax purposes. Hence, evidence of the other transactions could not have altered the nature or characterization of the criminal acts.

4. Finally, the district court's decision to exclude petitioner's evidence regarding his noncurrency futures trades did not violate his Sixth Amendment right to defend himself at trial, for it is the duty of the trial court to exclude irrelevant evidence. *United States* v. *Gorman*, 393 F. 2d 209, 212 (7th Cir.), cert. denied, 393 U.S. 832 (1968). See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150,

228-231 (1940). As stated by the court of appeals in *United States* v. *Downing*, 454 F. 2d 373, 376 (10th Cir. 1972):

> [T]he confrontation clause [of the Sixth Amendment] is to provide the accused with an opportunity to test the probative value of evidence sought to be introduced against him to prove an element of the offense with which he is charged. This opportunity is to be exercised within the framework of the prevailing rules of evidence, which in turn are rules distilled from centuries of experience with human nature to both develop the accuracy and reliability of the evidence, and also to work within the practical necessitics of trial procedure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-1060

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH SIEGEL, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The issues raised by this case involve "settled law"—to use the government's phrase [1]—only in the sense that the court of appeals has adopted an erroneous view of Federal Rule of Evidence 401 and the scope of a district court's discretion to exclude defense evidence. As this case and the government's response to our petition demonstrate, the lower federal courts have paid too little attention to the new law of relevancy set forth in Rule 401 and have continued to decide such issues more on the basis of instinct than analysis. The ultimate responsibility for ensuring proper application of Rule 401 lies with this Court. Petitioner in this case was wrongly deprived of his ability to mount a defense and the arguments he has raised cast a substantial "shadow of a doubt on his guilt." [2] That in itself should be a subject of grave concern, but his particular circumstances deserve still greater attention because other federal

[1] Brief in Opp., at p. 5.

[2] *Kaufman* v. *United States*, 394 U.S. 217, 242 (1969) (Justice Black, dissenting).

criminal defendants are bound to suffer from the same misinterpretation of the evidentiary rules and distorted view of a trial court's discretion. If the Supreme Court is to speak on this subject, and there can be no doubt that it must, the time to do so is now in this case.

1. Although the principal issue in this case concerns the definition of relevant evidence, the government avoids discussing or even citing the controlling test of relevancy contained in Rule 401. One might as well contend for a particular statutory construction without ever mentioning the statute. The error is one that has plagued this case ever since the district court, at the prosecution's urging, excluded the profferred evidence and deprived petitioner of his defense without engaging in the analysis Rule 401 demands. The government does nothing but perpetuate this error when it relies not on Rule 401, but on cases decided before its adoption without recognizing that "courts are to determine relevance by the standard established by the Rule, rather than relying on the maxims to be found in earlier cases or in precedents that applied a different test of relevance." 22 Wright & Graham, *Federal Practice and Procedure* § 5165, at p. 49 (1978).

One of these ancient maxims—invoked by the government[3] and relied upon by the courts below[4]—is that a defendant cannot introduce evidence of his innocent acts to show that he did not commit the offense with which he is charged. Rule 401 embodies no such legal principle. There is nothing in Rule 401 even to suggest that evidence showing a defendant's lawful actions must, for that reason, be excluded. Whether petitioner's evidence was relevant and thus admissible depended upon whether the test of Rule 401 had been met—that is, whether the offered evidence tended "to make the existence of a fact of

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[3] Brief in Opp., at pp. 6-7.

[4] Pet. App. 8a.

consequence to the determination of the action more probable than it would be without the evidence." As Professor James explained in a highly-regarded article, "[t]o determine the relevancy of an offered item of evidence one must first discover to what proposition it is supposed to be relevant."[5]

Neither the government nor the courts below undertook such an analysis. We have done so and demonstrated that petitioner's evidence was clearly relevant to a critical "fact of consequence" (Rule 401) in this case—whether, as the government sought to convince the jury, he devised a tax plan for his firm's client in 1974 and 1975 in which *every* trade by the firm for the client's tax purposes would be rigged, thus guaranteeing that the client would suffer no net loss. The excluded evidence was clearly relevant to this critical proposition[6] because it refuted the government's contention by showing that as part of the same tax plan for the same client and during the same period of time,

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[5] James, *Relevancy, Probability and the Law*, 29 Calif. L. Rev. 689 (1941), in *Selected Writings on the Law of Evidence and Trial* 610, 615 n. 15 (Fryer ed. 1957); see also McCormick, *Evidence* §185 (2d ed. 1972). The Advisory Committee's Note to Rule 401 cites and relies upon Professor James' work and Rule 401 adopts the test of relevancy he proposed in 1941.

[6] See our Petition, at pp. 15-19. The government asserts that these trades were somehow not pertinent because they were in commodity futures different than those charged in the indictment. Brief in Opp., at pp. 6-7. That entirely misses the point of our argument, which turns on the undisputed fact that the trades were part of the same tax plan. While the indictment may have charged illegality only with respect to particular transactions in Mexican pesos, the government sought to prove these charges by demonstrating the existence of a tax plan in which "every single trade" would be rigged (Tr. 122). The notion of such a plan was indeed critical to the prosecution since the government had no direct evidence linking Siegel to the pre-arranged trades. Evidence of other lawful transactions that were part of the same tax plan is clearly relevant to rebut the government's case. To the extent the government's distinction between currency and agricultural trades has any force, and we think it has none, that should have been a matter for the jury to consider, not a basis for refusing to allow petitioner to make his defense.

Siegel himself personally conducted hundreds of spread trades for the client, all of which were legitimate, all of which were for tax purposes and all of which placed the client at substantial risk.[7]

2. Invoking the oft-repeated apology for error, the government responds to our arguments by stressing the broad discretion of the district court.[8] According to the government, the district court had discretion to exclude relevant defense evidence under Rule 403, Fed. Rules Evid., because of "[1] considerations of undue delay, [2] waste of time, or [3] needless presentation of cumulative evidence." The government does not identify which of these particular considerations in Rule 403 it has in mind, but we can safely assume it is not the one dealing with cumulative evidence. If the district court relied on either of the other two considerations when it excluded the evidence on a "relevancy basis,"[9] the court did so without mentioning them or Rule 403. In any event, the notion that it would be a "waste of

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[7] The government's response also displays a distressing lack of attention to the facts. The government asserts that the excluded evidence related to trades conducted on "a different board of trade" than the International Monetary Market (IMM) where the Mexican peso trades were conducted. Brief in Opp., at pp. 4, 6. But *all* the trades — those in evidence and those excluded — were conducted on the floor of the Chicago Mercantile Exchange. The IMM is not a separate board of trade — it is merely a division of the Chicago Mercantile Exchange. See *Rules of Chicago Mercantile Exchange*, Chapter 1.

Moreover, the government is clearly mistaken in asserting — without citing the transcript — that "most" of the statements attributed to petitioner were "prior to the first noncurrency trade" (Brief in Opp., at p. 7, n.6). The statements (Pet., at pp. 22-23) were made in late 1974 and in the spring and summer of 1975; petitioner began making trades for Brady in hogs and pork belly futures prior to December 1974. See our Reply Brief in the court below, at pp. 5-8, and the transcript references there cited.

[8] Brief in Opp., at pp. 7-8.

[9] Pet. App. 120.

time" or cause "undue delay" to allow a defendant in a criminal trial to defend himself can be rejected out-of-hand. [10]

Long ago, Chief Justice Marshall warned that matters within a court's discretion are not left to its "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States v. Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807). [11] In this case the trial court could not have determined whether the value of relevant evidence was "substantially outweighed" (Rule 403) because it did not analyze the relevance of petitioner's offer of proof in terms of Rule 401, which is the controlling "legal principle." The government's resort to discretion, moreover, fails to recognize that Rule 401 provides a "rather liberal standard" of relevancy, [12] that "the overall effect of the relevance provisions in Article IV [of the Federal Rules of Evidence] is to limit the power of courts to exclude evidence," [13] and that except in very unusual circumstances the Sixth Amendment itself "denies the judge any discretion to exclude relevant evidence" offered by an accused. [14] This is why exclusion of such defense evidence presents an issue of "constitutional dimension" [15] — an issue raised by this case [16] but not addressed by the government in its reply.

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[10] The presentation of the case against Siegel consumed more than three weeks and the trial judge never inquired regarding how long the defense would have taken to introduce the excluded evidence. If there were concern on this score, the trial judge could have simply limited "the number of transactions in the proof." *United States* v. *Shavin*, 287 F.2d 647, 653 (7th Cir. 1961).

[11] Quoted in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975).

[12] 22 Wright & Graham, *supra*, § 5165, at p. 49.

[13] 22 Wright & Graham, *supra*, § 5162, at pp. 25-26.

[14] Westen, *Compulsory Process II*, 74 Mich. L. Rev. 191, 212 (1975).

[15] 22 Wright & Graham, *supra*, § 5166, at p. 76 n.51 (1978).

[16] Pet. at *i*.

CONCLUSION

For the foregoing reasons and the reasons set forth in our Petition, the writ of certiorari should be granted.

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